Public Prosecutor v Edmund Jammy Ngali & Anor

HIGH COURT (KOTA KINABALU) — CRIMINAL TRIAL NO K 46–08–1994
IAN CHIN J
29–30 AUGUST 1, 4–9,11–12, 13 SEPTEMBER 1995

Criminal Law *— Penal Code (Malaysia) — s 302 — Murder — Proving beyond reasonable doubt the ingredients of the offence — What caused the death of the deceased — Whether there was evidence of pre-arranged plan — Penal Code (FMS Cap 45) s 302 & 307*

The two accused were charged with committing murder in furtherance of a common intention to cause the death of the victim contrary to s 302 of the Penal Code (FMS Cap 45) ('the Penal Code'). Prosecution witness ('PW') gave evidence that he and the two accused went to a canteen in Kampong Linsuk in the evening on 21 February 1994. A number of people , including the deceased, had already gathered there and a card game accompanied by drinking was already in session. The first accused then joined the card game, become the banker and lost money but he did not pay his losses. This resulted in the deceased saying to the first accused words to the effect that the first accused should not have became the banker if he had no money. The card game ended there and people thereafter dispersed. The first accused drove the pickup away taking with him the second accused and PW to the road junction of Kg Bunga where they waited until the deceased came on the motorcycle. There was a further quarrel. The first accused drove after the deceased and rammed the motorcycle with the pickup. On the following day, the body of the deceased and the motorcycle were discovered. A post-mortem reviewed that the deceased suffered from several injuries and confirmed that the cause of death was the fracture of the cervical spine and that death was instantaneous.

Held:

(1) The two accused were discharged and acquitted of the charge of murder under s 302 of the Penal Code. In the case of the first accused, a case had been made out against him for attempted murder which if unrebutted would warrant his conviction on the two charges under s 307 of the Penal Code.

(2) To succeed on the charge of murder under s 302 of the Penal Code, the prosecution must prove beyond reasonable doubt the following ingredients, viz: (i) that the death of the victim had taken place; (ii) that the said death had been caused by, or in consequence of, the act of the two accused or anyone of them pursuant to a pre-arranged plan; (iii) (a) the act by which the death was caused was done with the intention of causing death; or (b) the act was done with the intention of causing such bodily injury as the offender knew to be likely to

cause the death of the person to whom the harm was caused; or (c) the act was done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted was sufficient in the ordinary course of nature to cause death; or (d) the two accused or any one of them pursuant to a pre-arranged plan knew that it was so imminently dangerous that it must in all probability caused death, or such bodily injury as was likely to cause death, and commited such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

(3) Except for the running over of the deceased and the cause of the deceased's death, the prosecution witness Walfred's evidence was on the whole very reliable.

(4) The opening statement of the prosecution implied that the death was caused by the pickup running over the deceased several times. But there was absolutely no evidence what blunt object had been used against the deceased and by which accused. And it was not the prosecution case that the fracture of the C7 cervical spine resulting in instantaneous death of the deceased was caused by anything else other than the pickup running over the deceased. Since the evidence showed that the deceased was still alive after the pickup had run over him, the prosecution had therefore failed to establish this ingredient.

(5) It was possible that the deceased died as a result of the head-long dive into the ravine and since it was not the prosecution case that the death was the result of the two accused driving the deceased into the ravine, the two accused could not be held responsible for the death of the deceased as a result of the head-long dive.

(6) As regards the second accused, there was no evidence that he had discussed with the first accused or had any conversation with the first accused about going to the junction to wait for the deceased. There was no evidence that there was any plan to ram the motorcycle. His mere presence in the pickup could not be construed to mean that he had agreed to ramming the motorcycle because it could very well be that he was in a moving vehicle and could not get out even if he disagreed with the action of the first accused of ramming the motorcycle. As for the subsequent event of running the pickup over the deceased, he had by then already alighted from the pickup and there was also no evidence that there was a pre-arranged plan to run the pickup over the deceased. It was held that common intention had not been established.

[Bahasa Malaysia summary

Kedua-dua tertuduh dipertuduhkan dengan melakukan pembunuhan dengan niat bersama untuk menyebabkan kematian mangsa bertentangan dengan s 302 Kanun Keseksaan (NMB Bab 45) ('Kanun Keseksaan'). Saksi pendakwa ('PW') memberikan keterangan bahawa

beliau dan kedua-dua tertuduh pergi ke kantin di Kampung Linsuk pada malam 21 Februari 1994. Beberapa orang, termasuk si mati, telah berkumpul di sana dan permainan kad bersama minuman telahpun bermula. Tertuduh pertama kemudiannya turut sama dalam permainan kad itu, menjadi 'banker' dan mengalami kerugian, tetapi beliau tidak membayar kerugiannya. Ini menyebabkan si mati berkata kepada tertuduh pertama kata-kata yang membawa maksud bahawa tertuduh pertama tidak sepatutnya menjadi 'banker' jika dia tidak mempunyai duit. Permainan kad itu berhenti setakat itu dan mereka kemudiannya bersurai. Tertuduh pertama memandu lori pikap membawa bersamanya tertuduh kedua dan PW ke simpang jalan Kg Bunga di mana mereka menunggu si mati datang dengan motosikal. Terdapat pergaduhan selanjutnya di sini. Tertuduh pertama memandu mengejar si mati dan melanggar motosikal itu dengan lori pikap itu. Keesokan harinya, mayat si mati dan motosikal itu dijumpai. Bedah siasat menunjukkan si mati mengalami beberapa kecederaan dan mengesahkan sebab kematian ialah keretakan tulang belakang serviks dan kematian adalah serta-merta.

Diputuskan:

(1) Kedua-dua tertuduh dilepaskan dan dibebaskan daripada tuduhan membunuh di bawah s 302 Kanun Keseksaan. Dalam kes tertuduh pertama, suatu kes telah diwujudkan terhadapnya untuk cubaan membunuh yang mana jika tidak dipatahkan akan menyebabkan sabitan atas dua tuduhan di bawah s 307 Kanun Keseksaan.

(2) Untuk berjaya atas tuduhan membunuh di bawah s 302 Kanun Keseksaan, pendakwa mesti membuktikan melampaui keraguan yang munasabah perkara-perkara berikut: (i) bahawa kematian mangsa telah berlaku; (ii) bahawa kematian tersebut telah disebabkan oleh, atau ekoran daripada, tindakan kedua-dua tertuduh atau sesiapa di antara mereka mengikut rancangan yang sudah diaturkan; (iii) (a) tindakan yang menyebabkan kematian itu dibuat dengan niat untuk menyebabkan kematian; atau (b) tindakan itu dibuat dengan niat untuk menyebabkan kecederaan tubuh badan sebagaimana yang diketahui oleh pesalah berkemungkinan menyebabkan kematian orang yang dikenakan kecederaan itu; atau (c) tindakan itu dibuat dengan niat untuk menyebabkan kecederaan tubuh badan kepada sesiapa, dan kecederaan tubuh badan yang diniatkan untuk dikenakan itu adalah mencukupi dalam keadaan biasa untuk menyebabkan kematian; atau (d) kedua-dua tertuduh atau sesiapa di antara mereka mengikut rancangan yang telah diaturkan mengetahui bahawa ianya adalah sangat ketara merbahaya sehinggakan ia berkemungkinan akan menyebabkan kematian, atau kecederaan tubuh badan yang mungkin mengakibatkan kematian, dan melakukan tindakan tersebut tanpa sebarang alasan untuk mengambil risiko menyebabkan kematian, atau kecederaan seperti yang dinyatakan.

(3) Selain daripada pelanggaran si mati dan sebab kematian si mati, keterangan saksi pendakwa, Walfred, adalah secara keseluruhannya boleh dipercayai.

(4) Pernyataan pembukaan oleh pendakwa membayangkan bahawa kematian itu disebabkan oleh lori pikap itu melanggar si mati beberapa kali. Tetapi langsung tidak ada bukti apa objek tumpul yang telah digunakan terhadap si mati dan oleh tertuduh yang mana. Dan bukan kes pendakwa bahawa keretakan tulang belakang serviks C7 yang menyebabkan kematian serta-merta si mati disebabkan oleh apa-apa perkara lain selain daripada lori pikap itu melanggar si mati. Oleh kerana bukti menunjukkan bahawa si mati masih hidup selepas lori pikap itu melanggarnya, pendakwa dengan itu gagal untuk membuktikan perkara ini.

(5) Adalah mungkin bahawa si mati meninggal dunia kerana junaman kepala dahulu ke dalam gaung dan oleh kerana ianya bukan kes pendakwa bahawa kematian itu disebabkan oleh kedua-dua tertuduh menjunam tertuduh ke dalam gaung, kedua-dua tertuduh tidak boleh diputuskan sebagai bertanggung jawab atas kematian si mati akibat daripada junaman itu.

(6) Berkenaan dengan tertuduh kedua, tidak ada bukti bahawa beliau telah berbincang dengan tertuduh pertama atau telah berbual dengan tertuduh pertama mengenai kepergian mereka ke simpang itu untuk menunggu si mati. Tidak ada bukti bahawa ada rancangan untuk melanggar motosikal itu. Kehadirannya dalam lori pikap itu semata-mata tidak boleh ditafsirkan sebagai beliau telah bersetuju untuk melanggar motosikal itu kerana mungkin sekali beliau berada di dalam kenderaan yang bergerak dan tidak boleh keluar walaupun beliau tidak bersetuju dengan tindakan tertuduh pertama melanggar motosikal itu. Berkenaan dengan kejadian kemudiannya iaitu melanggar si mati dengan lori pikap itu, beliau telah pada masa itu keluar dari lori pikap itu dan tidak ada bukti bahawa ada rancangan yang telah diatur terlebih dahulu untuk melanggar si mati dengan lori pikap. Adalah diputuskan bahawa niat bersama tidak dibuktikan.]

Notes

For cases on murder, see 4 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 920–957 and 963.

Legislation referred to

Penal Code (FMS Cap 45) ss 302, 307

Zahir Hussein Ahmad Shah (Deputy Public Prosecutor) for the prosecution.

Ansari Abdullah for the first accused.

Patricia Hiew for the second accused.

Ian Chin J:

A. THE CHARGE

Edmund Jammy Ngali ('the first accused') and Herman J Ngali ('the second accused') are charged as follows:

> That you both on or about the 21st day of February, 1994 at around midnight at Kilometre 27, Tenghilan Road, Tamparuli, Tuaran, in the District of Kota Kinabalu, in the State of Sabah, in furtherance of a common intention between you both, did commit murder by causing the death of one Liew Kim Loi @ Meehon I/C H 0799105 and thereby committed an offence under Section 302 of the Penal Code and read together with Section 34 of the same Act.

B. THE INGREDIENTS OF OFFENCE

To succeed, the prosecution must prove beyond any reasonable doubt the following ingredients, viz:

(1) that the death of Liew Kim Loi @ Meehon had taken place;

(2) that the said death had been caused by, or in consequence of, the act of the two accused or anyone of them pursuant to a pre-arranged plan;

(3) (1) the act by which the death is caused is done with the intention of causing death; or (2) the act is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused; or (3) the act is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or (4) the two accused or any one of them pursuant to a pre-arranged plan know or knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

C. THE EVIDENCE

Introduction

On 21 February 1994, Walfred Ireneus Jebin ('Walfred') for the better part of the afternoon of that day was in a yellow Datsun pickup bearing registration number ST2364B ('the pickup') driven by his childhood friend, the first accused. The two of them had been carrying goods and ferrying people around from one village to another. It was in the village called Kampong Malinsau that they had some local brew called Tapai. According to Walfred, he and the first accused felt giddy afterwards. Notwithstanding that, they both proceeded to a village called Kampong Linsuk with the first accused driving the pickup. They went to a canteen ('the canteen') in Kg Linsuk where a number of people had already gathered there and a card game, accompanied by drinking, was already in session. It was already evening.

The events of the canteen

Evidence was given that in the late afternoon of that day, that is 21 February 1994, Liew Kim Loi @ Meehon ('the deceased') and four others were already in the canteen drinking and playing cards. The deceased went to the canteen in a Yamaha RXZ motorcycle bearing registration number SA4203L ('the motorcycle'). They were later joined by Walfred and the two accused. Walfred and the first accused came in the pickup driven by the first accused after, as was mentioned earlier, they had drinks in Kg Malinsau. The first accused then joined the card game, became the banker and lost money but he did not pay his losses. This resulted in the deceased saying to the first accused words to the effect that the first accused should not have become the banker if he had no money. Petrus bin Maidol testified that the deceased and the first accused did not quarrel but that he did with the first accused and this is confirmed by Wileh Kulas. Wileh Kulas also said the deceased demanded and was paid RM3 by the second accused whereas Walfred said there was no such thing and that it was from the first accused that the deceased demanded payment of RM3 and that the first accused paid the sum while being angry but it appears that Walfred later on contradicted himself when he said the deceased returned the money to the second accused and thus implied that it was the second accused that the deceased demanded money from which version is more likely in view of the evidence of the other witnesses. Walfred testified that the deceased and the first accused did quarrel which Walfred described as being the deceased saying to the first accused the Malay words: 'Kalau tiada duit, jangan jadi chong' (translated to mean 'if you do not have the money, do not become the banker') to which, the first accused did not say anything in reply. This contrasted with Wileh's evidence who said the words said were: 'Lain kali tiada duit, jangan chong'. The card game ended there. I am inclined to believe the variance in the evidence was due to faulty recollection of minute details but the gist of which was correctly stated since the two versions conveyed the same meaning.

The episode involving the pickup and the motorcycle

These people thereafter dispersed. The first accused drove the pickup away taking with him the second accused, who was seated in the cabin beside the first accused, and Walfred, who was seated on one of the benches at the back of the pickup. The deceased had earlier left in the motorcycle. The rest of the evidence of the events came mainly from Walfred though Irma Suriyant bte Ismail ('Irma'), a school teacher, also provided some confirmation, and it is as follows.

> The pickup was driven to the road junction of Kg Bunga where they waited until the deceased came on the motorcycle. Irma was staying in a room just opposite the place where the pickup came to stop and she testified she saw the pickup and that she heard the ensuing argument about RM3 between the three persons, two from the pickup and one from a motorcycle. The two accused got out of the pickup and approached the deceased. According to Walfred, it was, after correcting himself, the second accused who brought

along a rotan when the two accused approached the deceased. This contrasted with Irma's evidence that it was the person who got down from the driver's seat that carried the rotan. But it is only a minor and insignificant discrepancy because the rotan plays no part in this case. The second accused then demanded the return of RM3 which the deceased obliged but the deceased, before he left on the motorcycle scolded and said 'Besok kita jumpa di kedai'. The first accused then said: 'Saya bubut kau ini'. The two accused then went back to the pickup and the first accused then drove after the deceased while Walfred was still seated at the back of the pickup. The pickup was driven fast and it caught up with the deceased. The first accused honked the deceased, who was then riding the motorcycle in the middle of the road, and the deceased replied. The first accused then rammed the motorcycle with the pickup. The deceased fell off the motorcycle and the motorcycle, after Walfred's evidence was again corrected, fell on the motorcycle's near-side which corrected version I accept since it is supported by the evidence of the expert. The deceased then went and tried to raise the motorcycle but the first accused pushed the motorcycle away with the pickup. The pickup then stopped, the second accused got out, went to the deceased and beat the deceased while the deceased pleaded for forgiveness. The pickup was again used to push the motorcycle further forward. After doing that, the first accused made a U-turn and headed straight for the deceased and while doing that, the first accused shouted to the second accused to get away. Walfred had then jumped down from the pickup. The first accused drove the pickup towards and hit the deceased, running the pickup over his body with the front tyre but Walfred is not sure how many tyres ran over the deceased. The pickup was reversed and again driven by the first accused towards the deceased but this time, the deceased avoided the pickup and rolled into the ravine. The pickup got stuck on the side of the road and the first accused tried unsuccessfully to move it and this made him call the second accused to help and the second accused in turn asked Walfred to help. The pickup was then, with the help of the second accused and Walfred, moved and parked by the side of the road. The second accused then pushed the motorcycle down the ravine after being told to do so by the first accused. It was after this that Walfred asked the two accused to go home but the first accused reacted and said: 'Ini bukan kes kechil, alang, alang'. The words alleged to be uttered were stated by Walfred at the preliminary inquiry as: 'Ini kes besar, alang alang'. This was to indicate that the two accused were not finished yet with the deceased. They went down the ravine to where the deceased had fallen. Walfred heard the first accused saying: 'Pegang, pegang' ('hold, hold') and the deceased saying: 'Tolong' ('help'). Walfred did not help because he was afraid and instead, ran away. Walfred almost reached home when the two accused came along and the second accused then said to Walfred that he should not let anyone know about what happened. On the next day, the first accused asked Walfred to go to Tamparuli with him but Walfred did not oblige.

Purchase of spare part and paint

On the next day, that is 22 February 1994, the first accused, according to Limban bin Kiring, drove the pickup to the workshop where he worked and he welded the bumper of the pickup. Another witness testified that sometime in February 1994, someone drove the pickup to his shop and purchased from him a tin of paint and a front grill.

Discovery of body and motorcycle

The body of the deceased and the motorcycle, among other items, were on 22 February 1994, at about 1.00pm, discovered by an 11 year-old boy called Alor bin Konsiau who called Loutin bin Sorigi. Loutin bin Sorigi, after confirming the presence of the body of the deceased, in turn reported to Lance Corporal Jaibin bin Sadie ('Jaibin') who was at that time in charge of the Tenghilan police pondok. Before going to the scene, Jaibin called the Tamparuli police station to inform them of the discovery of the body.

Recovery of body, motorcycle and other items. Information, arrest and seizure

Jaibin was the first policeman on the scene and he saw the body of the deceased, the motorcycle and various items in a ravine. Policemen from the Tamparuli police station, headed by Sub-inspector Tasman Sukiman ('Tasman'), converged on the scene where photographs were taken, sketch drawn and various articles were recovered. The body and the motorcycle were then removed from the ravine and taken to the Tamparuli police station. The body was taken by Jemrin bin Majid to the Queen Elizabeth Hospital, Kota Kinabalu, for a post-mortem which was conducted on 23 February 1994 by Dr Samuel Kumar ('the doctor') in the presence of Tasman and the body was identified by Chau Nyet Wuih as that of his brother-in-law, called Liew Kim Loi @ Meehon.

Information was on 23 February 1994 received by Jaibin that the two accused and Walfred were involved and this information was conveyed to the OCPD ASP Sidin Abdul Karim who gave instruction to Tasman to have the two accused and Walfred arrested and this was done on the same day. The pickup was also seized. The pickup, the motorcycle and the various items recovered were sent to the chemist for examination and analysis.

Expert evidence

The doctor testified that the deceased suffered the following injuries, viz:

(1) abrasions of the right hand, the back (31cm x 21cm), the abdomen (30cm x 20cm) and the right thigh (25cm x 15cm);

(2) lacerated wounds of the right knee (5cm x 1.5cm) and of the left knee (10cm x 10cm);

(3) haematoma of scrotum;

(4) swelling and decomposed face; and

(5) fractures, anteriorly, of the sternum below the level of the third rib; of the 4th left rib and of the cervical spine (C7).

The doctor testified that the cause of death is the fracture of the said cervical spine and that death was instantaneous. He said that the pickup could cause a fracture of the cervical spine. When cross-examined, he said the fracture could also be caused by the deceased falling and hitting his head first on the ground.

The other expert who testified was the chemist who took various specimens from both vehicles and he came to the conclusion that the front nearside of the pickup had come into contact with the rear of the motorcycle and that the front off-side of the pickup had come into forceful contact with the right side of the motorcycle, both impact of which occurred at different times.

D. CONCLUSIONS

I have no doubt that on the late night of 21 February 1994 the pickup driven by the first accused, with the second accused and Walfred as passengers, did come into contact with the motorcycle that was ridden by the deceased. Though the first accused, second accused and Walfred did have a lot of drink they were not inebriated as not to be able to perceive what was going on or, in the case of the first accused, as not to be able to drive the pickup though it can be expected that the drink would have impaired their judgment. Therefore, that Walfred and the other witnesses that I have adverted to should give contradictory accounts of what happened in the canteen is to be expected. What is clear is that the first accused was not able to pay his losses to the deceased which brought about the remark by the deceased against the first accused that the first accused should not be the banker if he does not have the money. It can be inferred that this remark must have irked the first accused because, instead of going home after the card game ended, the first accused drove to a road junction to wait for the deceased. Again, the evidence is clear that when the pickup was being driven there by the first accused, the second accused was seated in the cabin beside the first accused while Walfred was seated at the back of the pickup. When the motorcycle reached the junction where the first accused and party were waiting, the two accused argued with the deceased. If Walfred's recollection is faulty, surely the confirmation provided by the school teacher Irma that there was an argument that night at that place would put to rest any doubt that one may have as regards this argument. The school teacher also supported the evidence of Walfred that the pickup followed the motorcycle immediately after the motorcycle left. That the pickup stopped at the junction, waited for the deceased to arrive on the motorcycle and thereafter leaving soon after the motorcycle had left after the argument, leaves me in no doubt that the pickup was in fact chasing the motorcycle and this, though immaterial, must have come about because the first accused then already angered by the said remark at the canteen was challenged by the deceased to meet him the next day before the deceased left on the motorcycle. The first accused had in fact said that he was going to chase the deceased. There was no contradiction at all as regards the evidence of Walfred that the pickup caught up with the motorcycle and thereafter there were exchanges of honks. The pickup came into contact with the motorcycle. The expert evidence confirmed the contact between these two vehicles. There is nothing, at least not at this stage, to suggest that the contact was accidental. That the pickup was deliberately driven by the first accused to ram the motorcycle was borne out by the fact that though the first accused

stopped the pickup subsequent to the initial contact between the pickup and the motorcycle, he again used the pickup, that time, to push the motorcycle further and further forward. Such conduct exhibited the anger of the first accused which he at first directed at the motorcycle but later at the deceased by turning the pickup round and driving it straight against the deceased who was by then sitting on the road side after falling from the motorcycle as a result of it being rammed by the pickup. The pickup, driven by the first accused, ran over the deceased after the first accused had shouted to the second accused to get out of the way. I will pause here to advert to the submission of Mr Ansari Abdullah, learned counsel for the first accused, that the evidence of Walfred is not to be believed because of the contradictions in his evidence, some of which I have already mentioned, supra. The crucial parts of the evidence of Walfred are well supported by the evidence of other witnesses, like the berating of the first accused by the deceased at the canteen, the waiting by the first accused for the motorcycle and the ensuing argument at the junction, all of which I have already mentioned. The fact of the collision between the two vehicles is also borne out by the testimony of the expert who had examined the two vehicles and the related specimens. Tasman who drew a sketch of the scene also supplied the necessary evidence to support Walfred's evidence that the motorcycle was knocked down and thereafter pushed away. Walfred's evidence up to that stage is on the whole very reliable. As for the running over of the deceased, Walfred said that it was only once but Mr Zahir Hussein Ahmad Shah, learned Deputy Public Prosecutor, in his opening statement had said that, and therefore had sought to prove, that the pickup ran over the deceased several times. Walfred's evidence did not bear that out. This brings me to the question of the cause of the fracture of the C7 cervical spine which, according to the doctor, brought about the instantaneous death of the deceased. Walfred did not provide enough detail as to the part of the body of the deceased that the pickup ran over as to allow a conclusion that the pickup caused a fracture of the C7 cervical spine. But then Walfred's evidence was that the deceased was able to avoid the pickup when it made a second run at him by rolling away which does not bear out the fact that the pickup had caused the fracture because in such an event, the deceased would not have been able to roll to avoid the pickup as, according to the doctor, death was instantaneous. Could the said fracture that led to the death been caused by the deceased's head-long dive into the ravine? The doctor had testified that such a dive could cause the fracture but here again the evidence did not bear that out because, after the dive, assuming for the purpose that it was head-long, the deceased was heard by Walfred to be asking for help which means he was not dead yet and thus the dive could not have caused the fracture. But the deceased was found dead the next day. Could it then be irresistibly inferred that it must have been either the accused or both of them who had caused the death of the deceased? The learned deputy referred to the evidence of Walfred that the first accused had, before going down the ravine with the second accused, said: 'Ini bukan kes kecil, alang alang' which

A Walfred understood to mean the first accused still wanted to go after the deceased and that afterwards he heard the first accused saying: 'Pegang, pegang' ('hold, hold') and the deceased calling for help. Mr Ansari pointed out that at the preliminary inquiry, Walfred testified the words uttered were: 'Ini kes besar, alang alang'. It is also to be noted that there was no mention at the preliminary inquiry that the first B accused had said 'pegang, pegang' or that the deceased had shouted for help. The learned deputy did not direct his address on the points but he submitted that the deceased must have been 'hit by a powerful blunt object wielded by the accused persons whilst in the ravine'. The first point to be borne in mind is that the learned deputy in his opening C statement implied that the death was caused by the pickup running over the deceased several times. This appears to be the case for the prosecution when the learned deputy examined the doctor and stopped after the doctor had testified that the pickup could have caused all the injuries suffered by the deceased, including the fracture. In view of all that, I must be skeptical about the evidence of Walfred regarding what the first D accused was alleged to have said before and after going down the ravine and regarding what he heard about the deceased shouting for help. The second point is that there is absolutely no evidence what blunt object had been used against the deceased and by which accused. In any event, as I have said earlier, it is not the prosecution case that the E fracture was caused by anything else other than the pickup running over the deceased. Since the evidence shows that the deceased was still alive after the pickup had run over him, the prosecution had therefore failed to establish this ingredient. Because there was no such testimony at the preliminary inquiry, what Walfred said at this hearing about hearing the deceased asking for help could be a faulty recollection on the part of F Walfred. Therefore, it was possible that the deceased died as a result of the head-long dive into the ravine and since it is not the prosecution case that the death was the result of the two accused driving the deceased into the ravine, the two accused cannot be held responsible for the death of the deceased as a result of the head-long dive (see G Ratanlal & Dhirajlal's *Law of Crimes*, 23rd Ed, pp 1041–1042).

However, though it could not be proved that the death of the deceased was the result of the act of any of the accused, the evidence establish that the first accused by driving the pickup in the manner and under the circumstances which I have referred to, supra, as to ram the H motorcycle and to run it over the body of the deceased, had the intention to cause the death of the deceased or knew that the death of the deceased would result. This is so notwithstanding the drinking binge that he had hitherto indulged because I am of the view that the inebriation was not of a level that prevented his presence of mind in handling the vehicle, in pursuing the deceased and in ramming and I pushing the motorcycle with the pickup and also in running the pickup over the deceased. The first accused's attempt to quickly repair the damage to the pickup lent weight, though unnecessary, to the prosecution case that there was a criminal intent. This means that if the evidence is unrebutted the first accused could be convicted of two offences of

attempted murder under s 307 of the Penal Code. I will now come to the position of the second accused as regards whether what the first accused did, that is the ramming of the motorcycle or the running of the pickup over the body of the deceased was in pursuance of a pre-arranged plan of the two accused.

The second accused is the elder brother of the first accused. He was in the pickup by chance after the card game ended in the canteen. There is no evidence that he had discussed with the first accused or had any conversation with the first accused about going to the junction to wait for the deceased. Though after the deceased left on the motorcycle after saying he would meet them at the shop the next day, the first accused openly said he would chase after the deceased and the second accused then got into the pickup with the first accused, it can only be inferred that the second accused had agreed to the plan of the first accused to chase the deceased. The second accused had agreed to that by getting into the pickup. However, there is no evidence that there was any plan to ram the motorcycle. His mere presence in the pickup cannot be construed to mean that he had agreed to ramming the motorcycle because it could very well be that he was in a moving vehicle and could not get out even if he disagreed with the action of the first accused of ramming the motorcycle. As for the subsequent event of running the pickup over the deceased, he had by then already alighted from the pickup and there is also here no evidence that there was a pre-arranged plan to run the pickup over the deceased. In fact he was only aware that the first accused wanted to run the pickup over the deceased after he was told to step aside by the first accused. I agreed with the submission of Ms Patricia Hiew, learned counsel for the second accused, that common intention had not been established.

The two accused are therefore discharged and acquitted of the charge of murder under s 302 of the Penal Code. In the case of the first accused I rule that a case had been made out against him for attempted murder which if unrebutted would warrant his conviction on the two charges which I shall set out hereafter. Accordingly, I call upon the first accused to answer the following charges, viz:

First Charge

That you Edmund Jammy Ngali on or about the 21st day of February, 1994, did an act, ramming a motorcycle, numbered SA4203L, ridden by Liew Kim Loi @ Meehon, with a pickup, numbered ST2364B, at KM 27, Kota Belud/Tuaran Road, Kg Tinuhan, Tenghilan, with such intention or knowledge and under such circumstances, that if by that act you had caused the death of Liew Kim Loi @ Meehon, you would have been guilty of murder and that you have thereby caused hurt to the said Liew Kim Loi @ Meehon by the said act and thereby committed an offence punishable under s 307 of the Penal Code.

Second Charge

That you Edmund Jammy Ngali on or about the 21st day of February, 1994, did an act, running a pickup, numbered ST2364B, over the body

of Liew Kim Loi @ Meehon, at the KM 27, Kota Belud/Tuaran Road, Kg Tinuhan, Tenghilan, with such intention or knowledge and under such circumstances, that if by that act you had caused the death of Liew Kim Loi @ Meehon you would have been guilty of murder and that you have thereby caused hurt to the said Liew Kim Loi @ Meehon by the said act and thereby committed an offence punishable under s 307 of the Penal Code.

Order accordingly.

Reported by Richard Leung